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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-541

WILLIAM VON SLEICHTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner William Von Sleichter prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 15, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 267 A.2d 336. The opinion and supplemental opinion of the U.S. Court of Appeals for the District of Columbia Circuit are not yet reported. All three opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered on June 15, 1972. A timely petition for rehearing was denied on August 3, 1972. On August 22, 1972, Mr. Justice Rehnquist issued an order extending the time for filing this petition until October 3, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where conviction under a statute penalizing "cursing" in public is properly held to require proof that under "contemporary community standards" it is "so grossly offensive to members of the public who actually overhear it as to amount to a nuisance," does an arrest under such a statute violate the First Amendment when the officer does not know whether anyone but he actually heard the "cursing" or was offended by it?

2. Does such an arrest under such a statute violate the First Amendment when the officer, at the time he makes the arrest, knows he has no expectation of securing a conviction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

D.C. Code § 22-1107:

"*Unlawful assembly—Profane and indecent language.*

"It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or

incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense."

STATEMENT OF THE CASE

Petitioner seeks review of a conviction in the District of Columbia Court of General Sessions (now the Superior Court of the District of Columbia) for possession of narcotics in violation of D.C. Code Section 33-402 (1967). The narcotics were seized as a result of an arrest when he cursed a police officer who attempted to question him.

The sole issue in the case is whether narcotics introduced in evidence against appellant were admissible, which turns only on whether petitioner's arrest for cursing was lawful. The trial court, after a hearing, ruled that the evidence was admissible. Petitioner waived a jury trial and was convicted and filed $100 or ninety days in jail.

The conviction was affirmed by a divided District of Columbia Court of Appeals, 267 A.2d 336 (D.C. App. 1970).

(App. C) The United States Court of Appeals allowed petitioner's appeal and affirmed the conviction, one judge dissenting, on June 15, 1972 (App. A) It held that the cursing arrest was lawful, rejecting petitioner's contention that his rights under the First Amendment had been violated. A petition for rehearing was denied on August 4, 1972, one judge again dissenting. (App. B)

The arresting officer testified that one evening he spotted petitioner in an area "high in narcotics traffic" (Wisconsin Avenue and O Streets in Georgetown) with his hands "passing and changing" with two other men. (Tr. 7) This hand movement caused the officer to suspect a possible "narcotics transaction" (Tr. 15), although he saw nothing change hands (Tr. 16). The officer then started to cross the street towards the group (Tr. 7); as he admitted, petitioner at this point had committed no crime (Tr. 11).

At this point the petitioner began to walk away rapidly. (Tr. 7) The officer accosted him saying, "I want to talk with you a minute;" petitioner replied, "Fuck you," and began to run. (Tr. 8) The officer gave chase; petitioner ran around the corner and flattened himself on the ground behind a parked automobile where the officer found him, arrested him for cursing (disorderly conduct) (Tr. 9) and thereupon discovered the narcotics (Tr. 10).

The officer also testified that "five or six persons" were "within hearing range" of petitioner's remark (Tr. 12), but he did not know if any of them heard the remark and did not ask if they had (Tr. 13).

Petitioner was not prosecuted for disorderly conduct, the basis for his arrest, but instead for possession of narcotics. He moved to suppress the narcotics evidence. The Government contended that petitioner had been lawfully arrested

for a narcotics violation. The trial judge agreed and denied petitioner's motion. Petitioner was convicted and appealed.

The D.C. Court of Appeals voted two-to-one to affirm the conviction. There was no majority opinion, each of the two judges voting to affirm on a different ground. Only one judge upheld the "cursing" arrest. (App., p. C-9) Another dissented (App., p. C-11) and the third judge voted to affirm on other grounds.[1]

The United States Court of Appeals granted review[2] and affirmed in an opinion dated June 15, 1972. (App. A) The majority affirmed the conviction on the ground that petitioner's arrest for disorderly conduct was lawful. The majority held that the officer had probable cause to make a "cursing" arrest on the sole basis of the officer's testimony that there were "five or six persons within hearing range."

The majority stated that it accepted the controlling force of *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969) (*en banc*), which held that the importance of protecting the First Amendment right to protest police actions can only be outweighed if the "cursing": (1) "creates a substantial risk of provoking violence," or (2) "is, under 'contemporary community standards,' so grossly offensive to

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[1] Judge Nebeker believed that, although the officer told petitioner he was under arrest, the court should view it as a lawful *Terry* stop.

[2] Until February 1970, that court had a discretionary review power over decisions of the D.C. Court of Appeals, D.C. Code § 11-321(b), which power Congress eliminated in the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358.

members of the public who actually overhear it as to amount to a nuisance." (419 F.2d at 646) (footnotes omitted)

Thus, the court stressed that "shock on the passers-by" is the essential element. The court held, however, that there need be no evidence of either of the two aspects of this essential element, *viz.*, that members of the public "actually overhear" the epithet or that they are grossly offended by it. As for the first aspect, it was enough that the officer testified that there were persons within hearing; in fact, said the court, it did not matter that the officer, after arresting petitioner, made no effort to go back to look for those persons. (App., p. A-7) As for the second, the court said that the officer's own experience—which included service in this area—led him to consider these words as "profanities." (App., pp. A-7, A-8) There was no evidence of what the officer did or did not consider. Nor was there evidence that in "this area" the remark in question is considered by anyone to be a "profanity." Lacking such evidence, the court of appeals relied upon its conclusion that "these words have at least some minimal shock quality." (App., p. A-8)

The court of appeals made clear that it was upholding the arrest notwithstanding the genuine doubt that a conviction for disorderly conduct could ever be obtained:

> We are not here deciding that appellant was guilty of disorderly conduct, or even that the policeman's account necessarily establishes appellant's guilt if unrefuted. The trial of these cases may come to balance the interests of free speech and good order. The ultimate balancing of these interests, often delicate and difficult, must take place in court rather than on the beat. (App., p. A-8)

But, of course, in this context there could be no trial to "balance the interests" or to determine whether "good order" was in fact disturbed.

Petitioner timely petitioned the court of appeals for rehearing and suggested rehearing *en banc*. Petitioner urged upon the court the controlling force of this Court's *per curiam* vacation, on June 26, 1972, of convictions for disorderly conduct (obscenity) in *Rosenfeld v. New Jersey*, 33 L.Ed.2d 321 (1972), *Lewis v. City of New Orleans*, 33 L.Ed.2d 321 (1972), and *Brown v. Oklahoma*, 33 L.Ed.2d 326 (1972). The petition for rehearing was denied, again with one judge dissenting and pointing out the dangers, under the First Amendment, of the majority's distinction between arrests and convictions. (App. B)

REASONS FOR GRANTING THE WRIT

The decision below approves an obnoxious and unconstitutional police practice: arresting citizens who utter "curse words" when accosted by police. The decision thus authorizes a serious and unlawful infringement upon the liberty of many citizens, persons who typically have no effective means of redress. It also permits police to ignore the "stop and frisk" safeguards so carefully set out by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The case calls out strongly for this Court to declare its disapproval of this all-too-common police abuse of "cursing" statutes in typical, tension-producing street encounters.

When the alleged disorderly conduct is solely speech ("curse words"), before an officer may arrest he must have direct evidence of the essential element of the offense – not merely that the words were spoken but also that other persons (not police officers) actually overheard the words and were grossly offended, so much so that the speech can reasonably be deemed a public nuisance.

1. That this case involves an arrest, rather than a conviction, for disorderly conduct makes it all the more important that this Court review it.

It is a widely recognized fact that "the policeman's exercise of discretion to arrest partakes in many respects the character of a final disposition. The arrest itself is a sanction." Model Penal Code § 250.1 (Disorderly Conduct), comment 4(a), at p. 14 (Tent. Draft No. 13, 1961).

Arrests for minor offenses like disorderly conduct are especially likely to constitute a final disposition: a study in 1966 showed that for the previous fifteen years there had been some 15,000 to 20,000 arrests for disorderly conduct *each year* in the District of Columbia, or one arrest for about every 40 or 50 residents.[3] The study also showed that some 80 percent of these arrests resulted in the forfeiture of collateral, thus never being subjected to judicial review. Wald and Hoffman, Report on Disorderly Conduct (Unpub., July 16, 1966).[4]

Moreover, police misuse of disorderly conduct statutes generally was cited by both the national and Dist of Columbia crime commissions as a major source of aggravating tension in cities. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, at pp. 102-04, 106-07 (1967); Report of the President's Commission on Crime in the District of Columbia,

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[3] This is not only a local problem. The President's Crime Commission reported that arrests for such minor crimes accounted for almost one-half of all arrests made throughout the United States each year. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, at p. 187 (1967).

[4] A copy of this study is in the files in the Offices of Criminal Justice, U.S. Department of Justice, Washington, D.C.

at pp. 632-33 (1966). Another study indicated that the number of disorderly conduct arrests in the District of Columbia based upon speech alone may have been as high as 7,000 to 10,000 a year.[5]

The standard applied in making arrests for disorderly conduct – especially when it involves only speech and especially when 80 percent of the cases never come before a court – is therefore of profound significance, perhaps even more important than the standard applied at trial.

2. Under *Cohen v. California*, 403 U.S. 15 (1971), it is clear that petitioner could not validly have been convicted of disorderly conduct.

In *Cohen*, the Court reversed a conviction for disturbing the peace based upon the wearing, in a courthouse, of a jacket bearing the words, "Fuck the Draft." The Court held that the state may not use the criminal law to eliminate offensive words from public speech unless the circumstances fit into one of the limited categories in which speech can be suppressed. These categories are confined today to obscenity, "fighting words," and cases where "substantial privacy interests are being invaded in an essentially intolerable manner." (403 U.S. at 20-21) Only the last category is involved here.[6]

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[5] "Two Week Study of 102 Disorderly Conduct Arrests in the Tenth Precinct" (available in the files of the Office of Criminal Justice, Department of Justice, Washington, D.C.)

[6] As Mr. Justice Harlan pointed out in *Cohen*, with reference to the same word which is at issue here, "it cannot plausibly be maintained that this vulgar allusion . . . would conjure up such psychic stimulation in anyone" as to bring it within the standard established in Roth v. United States, 354 U.S. 476 (1957), for what is erotic. 403 U.S. at 20. As for the "fighting words" test of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), it is employed only when the language is "inherently likely to provoke violent reaction" when addressed to the ordinary citizen. 403 U.S. at 20.

The Court of Appeals for the District of Columbia Circuit had previously reached a similar conclusion in an important *en banc* decision interpreting the very statute under which petitioner was arrested. *Williams v. District of Columbia,* 419 F.2d 638 (D.C. Cir. 1969) (*en banc*). The court concluded that the statute would not be constitutionally invalid if the seemingly literal prohibition against "cursing" in public were interpreted to require an additional element: "that the language be spoken in circumstances which threaten a breach of the peace." The court then made explicit that it had only two limited "breach of the peace" situations in mind:

> either because the language creates a substantial risk of provoking violence, or because it is, under "contemporary community standards," so grossly offensive to members of the public who actually overhear it as to amount to a nuisance. 419 F.2d at 646.

Mr. Justice Powell, in a recent dissenting opinion joined in by the Chief Justice and Mr. Justice Blackmun, cited this language from *Williams* with approval: "I agree with this view that a verbal assault on an unwiling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal prosecution, whether under a statute denominating it disorderly conduct, or more accurately, a public nuisance." *Rosenfeld v. New Jersey,* 33 L.Ed.2d 321, 323 (1972) (dissenting opinion). Mr. Justice Powell gave not the slightest indication that the mere utterance of a curse word, even in the hearing of others, could constitutionally be punished: "[O]ur free society must be flexible enough to tolerate . . . debasement [of the level and quality of public discourse] provided it occurs without subjecting unwilling audiences to . . . verbal nuisance," *i.e.,*

speech which results in "shock and sense of affront, and sometimes the injury to mind and spirit . . . ." 33 L.Ed.2d at 324.[7]

3. The court of appeals in this case erroneously held that the officer had authority to arrest petitioner because he had "probable cause" to believe that a misdemeanor had been committed in his presence, that is, "probable cause to believe appellant [petitioner] subjected bystanders to a nuisance." (App., p. B-3)

It is not entirely clear that "probable cause" is the proper test,[8] but if it is the court of appeals was entirely

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[7] It bears noting that at common law "cursing" is an offense only when engaged in to such an extent as to become a public nuisance. See 2 Wharton, Criminal Law and Procedure § 808 (Anderson ed. 1957); Prosser, *Torts*, ch. 17 (3rd ed. 1964); *cf.* 4 *Restatement, Torts*, §822, comment (1939).

[8] There is reason to believe that when petitioner was arrested on October 3, 1969, more than "probable cause" may have been required to effect the arrest. D.C. Code § 23-306 enumerated certain instances (none of which is applicable here) in which a misdemeanor arrest could be made without a warrant "as in the case of a felony, upon probable cause." In all other cases § 4-140 provided that police could arrest without a warrant

> any person who *shall commit*, or threaten or attempt to commit, *in the presence of* [a police officer], or within his view, any [1] breach of the peace or [2] offense.... (Emphasis and brackets added.)

In the 1970 general revision of the judicial and criminal procedure titles of the D.C. Code, Congress replaced these provisions with a new section apparently authorizing arrests without a warrant whenever an officer has "probable cause to believe" an "offense" has been committed or is being committed in his presence. D.C. Code § 23-581(a)(1)(B). Nothing is said in the new law about arrests for "any breach of the peace," however, and it is thus possible that probable cause is not enough to support such arrests.

unjustified in holding that the street situation described in the transcript provided the officer with enough information to make the probable cause determination:

(a) No person complained to the arresting officer nor gave any other indication that he or she even heard petitioner's remark, let alone was offended.

(b) The remark was uttered only once. It was not repeated and was not followed by other offensive language. (In *Rosenfeld,* Mr. Justice Powell noted that the offensive remark was made four times, 33 L. Ed.2d at 322, and in *Brown v. Oklahoma,* 33 L. Ed.2d 326 (1972), the appellant made several vulgar references in the course of his talk. See 33 L. Ed.2d at 325.)

(c) The remark was uttered on a public street in an area the police officer testified was "high in narcotics traffic," and there was no indoor "captive audience" (as there apparently was in *Rosenfeld* and *Brown*).

(d) Petitioner's remark was directed only to the officer who accosted him and not to any bystander.[9]

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[9] The court of appeals in *Williams* was at pains to point out that it was following the lead of the Model Penal Code and was using the word "public" (in the phrase "grossly offensive to members of the public") in such a way as "to exclude from the offense situations where it is only 'the policeman's peace and quiet that are allegedly disturbed.' Model Penal Code § 250.1, comment at pp. 13, 17 (Tent. Draft No. 13, 1961)." 419 F.2d at 646 n. 25. The officer is supposed to be trained to withstand such annoyances.

(Cont'd.)

All the police officer – and the court of appeals – had to go on were (1) the word itself and (2) the officer's testimony that there were "five or six citizens within hearing range." This is not enough. Mr. Justice Harlan pointed out in *Cohen* that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." The state may not, without compelling justification, "make the simple public display here involved of this single four-letter expletive a criminal offense." 403 U.S. at 25-26. In other words, if walking around in a Los Angeles courthouse wearing "Fuck the Draft" on one's back cannot constitutionally become a conviction for disturbing the peace, surely uttering the same word once orally on a public street cannot be treated differently.[10]

Ftn. 9 – (Cont'd.)

The Court applied a similar exception to the "fighting words" branch of the offense, citing the same section of the Model Penal Code. 419 F.2d at 646, n. 23. On this latter point, see also the concurring opinion of Mr. Justice Powell in Lewis v. City of New Orleans, 33 L.Ed.2d 321 (1972), in which he noted that "the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen." See People v. Lukowsky, 94 Misc. 500, 159 N.Y.S. 599 (1916); State v. Johnson, 149 Mo. App. 119, 130 S.W. 110 (1910); State v. Moore, 166 N.C. 371, 81 S.E. 693 (1914); Oratowski v. Civil Service Comm'n, 3 Ill. App.2d 551; 123 N.E.2d 146 (1954) (dictum); The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and the Administration of Justice, p. 102 (1967).

[10] The court in *Williams*, both in the panel opinion by then-Circuit Judge Burger and in the *en banc* opinion by Judge McGowan, made it clear that there was no "valid social purpose in prosecuting [offensive] words when uttered by a hapless stonemason struck by a falling brick and responding in socially unacceptable terms."

(Cont'd.)

The court of appeals seeks to avoid the impact of *Cohen* by stressing that only an arrest and not a conviction is involved in this case.[11] But as we have shown, the arrest is

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Ftn. 10 – (Cont'd.)
Williams v. District of Columbia, No. 20,927, slip op., p. 7, (D.C. Cir., June 28, 1968) (Burger, J.); 419 F.2d at 644. If, however, the stonemason's language – assuming it is identical to petitioner's – is excused, it is not because the words have a lesser impact on the hearer. Nor can a distinction based on intent be made between petitioner's utterance and that of the hypothetical stonemason; in neither situation is there a "willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" of passers-by. 33 L.Ed.2d at 322-23. Each situation involves the purely verbal, and immediate, expression of the emotions attendant upon a stressful occurrence. The utility of verbal freedom has been recognized both in the field of psychology, see Montagu, *On the Physiology and Psychology of Swearing*, 5 Psychiatry 189, 199 (1942); Stengel, *Hughlings Jackson's Influence in Psychiatry*, 109 Brit. J. Psychiat. 348-355 (1963); Menninger, *The Vital Balance* 137-38 (1963), and in the law of torts, see Clark v. Associated Retail Credit Men, 105 F.2d 62, 64 (D.C. Cir., 1939); Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (D.C. Mun. App. 1946); Prosser, *Torts*, 47 (3rd ed. 1964); Bohlen, *Fifty Years of Torts*, 50 Harv. L. Rev. 725, 733 (1937); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033; 1053 (1936).

[11] The court also attempts to distinguish *Cohen* in two other ways, neither of them sufficient.

First the court says that the offensive word in *Cohen* was written whereas here it was oral. But of course the law of defamation establishes that written "speech" is potentially much more damaging than its oral counterpart because it is apt to make a stronger impression on the mind than something heard once and because it endures for others beyond the moment of its initial expression. While "those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes," 403 U.S. at 21, the offensive word would still be there if "their eyes" were to turn again or if others were to come near enough to see. On the other hand, petitioner's expression was uttered once into the night air and vanished there as people continued on their ways.

(Cont'd.)

typically a final sanction in cases like these. The decision below would thus permit wholesale evasion of *Cohen* by police because it would permit an officer to make an arrest – for speech alone – where it is almost certain that no conviction could result.

This is a serious result, for what it really means is that police may now resume, with judicial approval, the pre-*Williams* practice of arresting citizens who "talk back." The court of appeals that decided *Williams* had evidence before it that police in the District of Columbia who made arrests for "cursing" are often motivated to do so, not by any concern for the sensibilities of bystanders, but instead by their annoyance at not receiving the respect or deference they feel entitled to.[12] There is almost invariably testimony that citizens actually overheard the defendant's words (which

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Ftn. 11 – (Cont'd.)

The court also says that the expression used in *Cohen* had political overtones. Of course it did. But petitioner's remark was equally deserving of strong First Amendment protection. It constituted a protest against the policeman who accosted him. If, as the opinion below accepts, petitioner had no legal obligation to cooperate with the police (App., p. A-5), he likewise had "the freedom to speak foolishly and without moderation" in expressing his criticism of "public men and measures," Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (Frankfurter, J.); Bridges v. California, 314 U.S. 252, 270 (1941).

[12] Strong evidence of this emerges from *Williams* where the defendant was arrested for using phrases no more offensive than "God damn" and "son-of-a-bitch." The problem is of course not only a local one. For a case having facts very like those in *Williams*, see People v. Cuvelier, 167 N.Y.S.2d 871 (Co. Ct. 1957). See also People v. Bomboy, 32 Misc.2d 1002, 229 N.Y.S.2d 323 (Sp. Sess. 1962); People v. Tinston, 6 Misc. 2d 485, 163 N.Y.S.2d 554 (Magis. Ct. 1957); Thompson v. City of Louisville, 362 U.S. 199 (1960); Lane v. Collins, 29 Wis. 2d 66, 138 N.W.2d 264 (1965); Scott v. Feilschmidt, 191 Iowa 347, 182 N.W. 382 (1921); Pavish v. Meyers, 129 Wash. 605, 225 Pac. 633 (1924).

may often be true), but those witnesses are rarely, if ever, produced by the prosecution to testify.[13] In the few cases in which the defense has located the witnesses, they usually do not support the officer's speculation that their peace was seriously disturbed.[14]

The court of appeals in this very case recognized that this case involved a citizen "talking back" to an officer when it observed that the "context" of petitioner's remarks – "in response to an officer's civil inquiry" – is "pertinent." In other words, although the real reason the officer made the arrest might well have been his own annoyance at the disrespect shown to him, the court of appeals sustains the arrest on the entirely different theory that the officer had "probable cause" to believe that the utterance of this one remark on a street corner at eight in the evening was heard by several citizens and that they were so grossly offended by this single word that its utterance can fairly be called a nuisance.

We strenuously urge that this delegation of authority to police to arrest for speech on public streets should be reviewed and sharply curtailed by this Court. We think that unless and until the officer has direct evidence of the essential elements – that (a) persons "actually overhear" the

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[13] In a recent deposition on file in the District Court for the District of Columbia (James v. Lusby, Civ. No. 970-72), an officer showed that police still are not instructed to obtain the names of the bystanders in such cases. The officer testified he had never obtained the name of a bystander in a single "cursing" arrest. When asked if he would normally try to obtain names of witnesses in other types of cases, he testified that he would, and added: "And the complainant would be there." (Tr. 33)

[14] This occurred in *Williams* itself.

remark and that (b) under "contemporary community standards" it is (c) "so grossly offensive . . . as to amount to a nuisance" – arrests for offensive speech should not be permitted.[15]

4. The error of the court of appeals in this case, however, goes much deeper. It is not only the fact that the officer did not ascertain whether the bystanders had actually overheard petitioner's remark and were grossly offended; it is also the fact that he could not have done so. The reason is that when petitioner uttered his remark he ran. The officer promptly gave chase and "did not take time to canvass the passers-by to learn whether they had in fact been offended." (App. p. A-7) Nor did he return to the scene after making the arrest. In other words, even if the officer would have been allowed to give hearsay testimony at a trial, it would still have been impossible for petitioner to have been convicted of disorderly conduct.

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[15] On the general subject of the standard to be followed in making arrests, there is debate over whether the officer should construe the statute broadly or, as it will be construed at trial, strictly. W. LaFave, Arrest: The Decision to Take A Suspect into Custody (The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States) 84-85 (1965). A logical working assumption should be that the more serious the crime, the greater the authority to arrest. Where a minor crime such as disorderly conduct is involved, a crime with no identified victim and involving only speech, the police officer should be extremely sure of his basis for arrest. Probable cause, an elusive concept when the elements of "grossly offensive," "contemporary community standards," and "amount[ing] to a nuisance" must be considered, is insufficient. The officer should have direct evidence, at the time of the arrest, of all necessary elements of the offense. Optimally, such evidence will be provided by unsolicited complaints to the police.

Thus, the court of appeals has sanctioned arrests for speech when at the time of arrest, the officer was "without any expectation of securing valid convictions"[16] for disorderly conduct. And the court has done so explicitly:

> Nor was he required, on apprehending defendant [petitioner] some blocks away, to return to the original scene for an interview with the spectators. The fact that they had in the meanwhile gone about their business would not undercut the arrest. (App., p. A-7)

No citizen had complained or given any other indication of even having heard petitioner's remark. If the officer had stopped to interview passers-by, he might never have apprehended petitioner. But what this proves is the evanescence of petitioner's possible "crime." When a police officer hears a "curse word" but receives no complaint, and when he has a choice between tolerating the word and chasing the "offender" with the knowledge that no conviction will be possible, we think this Court should make clear that tolerance and not arrest is the only constitutionally permissible choice.

5. Finally, the court of appeals decision would permit undermining of *Terry v. Ohio*.

When the Court decided *Terry*, it recognized that it was dealing with an extremely sensitive subject: police-citizen encounters on the street in circumstances where there is no probable cause to arrest. For this reason, the Court carefully erected safeguards against unwarranted police intrusion upon an individual's personal security. As Judge

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[16] Younger v. Harris, 401 U.S. 37, 64 (1971) (Douglas, J., dissenting).

Curran said recently, "a mere hunch of criminal activity will not justify the officer in making detention for investigatory purposes." *Gomez v. Wilson*, 323 F. Supp. 87, 92 (D.D.C. 1971). Instead, the officer must be able to articulate specific facts which reasonably led him to believe that criminal activity was underfoot.

In view of the companion case of *Sibron v. New York*, 392 U.S. 40 (1968), the officer in this case clearly had no lawful basis for a *Terry*-type compelled "stop."[17] The court below recognized this explicitly. (App., p. A-5) But because petitioner's uncooperative response included a "curse word," he was arrested.

This should not be allowed. Citizens must be allowed some leeway in the language used in refusing to respond to an officer when a response could not be compelled under *Terry*. If the lower court decision stands, the safeguards the Court set out in *Terry* will no longer have practical significance in a great many day-to-day street situations, the very situations in which the safeguards are needed most.

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[17] As Judge Curran pointed out in *Gomez v. Wilson*, however,

> It can fairly be said that when a policeman stops and questions a person on the street, that person to a degree is restrained. The officer's uniform, badge, and all the other indicia of his position and power as a law enforcement authority are at the moment thrust upon the person. The individual will at least stop and listen to the questions being asked, and in just about all cases, he will feel compelled to do so. 323 F. Supp. at 91.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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October 3, 1972

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,456

WILLIAM VON SLEICHTER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District of Columbia Court of Appeals

Decided June 15, 1972

Judgment entered this date

Mr. William A. Dobrovir (appointed by this court) for appellant.

Mr. John O'B. Clarke, Jr., with whom *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

Messrs. John Vanderstar and *Ralph J. Temple* filed a brief on behalf of The American Civil Liberties Union Fund of the National Capital Area, as *amicus curiae*.

Before WRIGHT, LEVENTHAL and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by LEVENTHAL, *Circuit Judge.*

Dissenting opinion filed by WRIGHT, *Circuit Judge*, at p. 10.

LEVENTHAL, *Circuit Judge:* This case comes before us following allowance of appeal from the District of Columbia Court of Appeals (DCCA). See 267 A.2d 336 (1970). Appellant appeals his conviction for possession of heroin. The facts are these: one evening, appellant was standing in the shadows of a building in Georgetown in the company of two other young men. A police officer observed the three from across the street and noticed that their hands were "passing and changing" among them. Since this area is considered by the police to be "high in narcotic traffic," the officer decided to investigate. Crossing the street, he approached the three men. Appellant began to walk rapidly away. The officer called out to him, "I would like to talk with you a minute." Appellant then shouted "fuck you" and ran. There were pedestrians within earshot at the time. The officer gave chase and apprehended appellant one and one-half blocks away, with the assistance of pedestrians, when appellant attempted to crawl underneath a Volkswagen parked at curbside. The officer informed appellant that he was under arrest for disorderly conduct and ordered him to place his hands in view. Appellant ignored this command. After appellant ignored a second such command, the officer told him to "bring his hands out" from under his stomach, or the officer would help him bring them out. Appellant then obeyed. On the ground where he had been lying was a bag of heroin, in plain view.

There was no opinion for the DCCA, since Judge Gallagher dissented, and the votes of Judges Nebeker and Kern for affirmance were based on distinctly different legal premises.[1]

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[1] Judge Nebeker considered that the policeman's order was

While disorderly conduct is a crime without physical evidence or fruits,[2] a policeman apprehending the possibility of danger may conduct a search incident to a lawful arrest for disorderly conduct for the purpose of discovering and removing weapons, and may command the person arrested to place his hands where they could be seen. When such a command was given to appellant, it constituted a search of his hands, but a valid search. Once that lawful command was obeyed, the heroin was in plain view. See Harris v. United States, 390 U.S. 234 (1968). The central question is whether the arrest was lawful. We hold that it was, and that the search for weapons, incident to a valid arrest, was likewise lawful.

Appellant maintains that the arrest which was the predicate for the search cannot be sustained as valid. While the four-letter expletive may at one time have warranted arrests, it has now, he says, become so commonplace that it has been drained of offensiveness—that time and contemporary usage have leached the word both of meaning and shock value. He relies on the precedents of Williams v. District of Columbia, 136 U.S. App. D.C. 56, 419 F.2d 638 (en banc 1969), and Cohen v. California, 403 U.S. 15 (1971).

This contention reads *Williams* too narrowly. The court interpreted the statute (22 D.C. Code § 1107) prohibiting,

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sustainable under Terry v. Ohio, 392 U.S. 1 (1968), on the ground that the situation merited investigation, the policeman's order was appropriate for his own protection and that it was irrelevant whether the policeman had already arrested his suspect or whether he had probable cause for such arrest. Judge Kern took the position that the drugs appeared as the result of a search that was valid because incident to a valid arrest for disorderly conduct. We affirm on the ground set forth in Judge Kern's opinion.

[2] *See* United States v. Mills, ——U.S. App. D.C. ——, —— F.2d —— (slip opinion p. 6) (en banc 1972).

as disorderly conduct, the utterance on a street of "indecent or obscene words," as requiring as an element of the offense either (a) that these words be spoken in circumstances which create a threat of violence, or (b) that the language "is, under 'contemporary standards,' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." 136 U.S. App. D.C. at 64, 419 F.2d at 646 (footnotes omitted). There is a state interest "in protecting the sensibilities of passers-by" against shock, see Street v. New York, 394 U.S. 576, 591 (1960), and this does not depend on a showing of any tendency to result in violence.[3] *Williams* notes, with reference to the ALI's Model Penal Code, that the statute is directed to a public annoyance, and is not applicable merely because a policeman's peace and quiet are disturbed. This narrowing construction avoids the constitutional infirmity of facial invalidity, *cf.* Gooding v. Wilson, —— U.S. —— (March 23, 1972).[4]

Appellant's words were in a context that is pertinent. We are not to be taken as suggesting that these words would suffice for an arrest if uttered, to take the hypothetical case

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[3] "Coarse or indecent language is penalized . . . regardless of any actual or presumed tendency to evoke disorder among the hearers, since the interest we seek to protect is freedom from present nuisance rather than freedom from anticipated violence." Model Penal Code § 250.1, Comment at 7 (Tent. Draft No. 13, 1961).

[4] *Gooding* considers the specificity required of a statute necessary to sustain a conviction for fighting words, because the language has a "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." It does not discuss in any way the separate problem of the use in public of words so grossly offensive as to amount to a nuisance. The Supreme Court held the state court decisions had not narrowed the construction of the overbroad statute. In this jurisdiction, *Williams* has provided that narrowing construction.

put in *Williams,* by a "hapless stonemason" who accidentally stubs his toe, and whose spontaneous profanity is patently devoid of any possible offense. But appellant's words were in response to an officer's civil inquiry, a request for cooperation that may lawfully and reasonably be directed to citizens at large without any charge of crime. It is one thing to say that a citizen's cooperation is a moral duty rather than a legal duty that can be compelled.[5] It is quite another to contend that the Constitution provides an immunity from arrest for a person who chooses to manifest his unwillingness to cooperate with the shout of a four-letter expletive on a public street, within earshot of passers-by. His primary verbal target may have been the officer; but he cannot stake out a constitutional right to disregard shock on the passers-by.

We are not here deciding that appellant was guilty of disorderly conduct, or even that the policeman's account necessarily establishes appellant's guilt if unrefuted. The trial of these cases may come to balance the interests of free speech and good order. The ultimate balancing of these interests, often delicate and difficult, must take place in court rather than on the beat. The *Williams* rationale is sufficient to establish probable cause for the arrest of appellant for disorderly conduct.

Cohen v. California is distinguishable. It involved a written, rather than a shouted, sentiment. Justice Harlan took note of this when he said that people who might be offended could avoid distress by modestly "averting their eyes." 403

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[5] As Judge Danaher noted, while an officer may ask questions, the person may decline to talk, see Green v. United States, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958). While this fact, or even flight, is not ground for arrest, it may be taken into account along with other evidence in considering whether there is ground for a stop or probable cause for arrest. As already noted (*supra,* note 1) we do not determine in this case whether there was a basis for detention on a narcotics charge.

U.S. at 21. Even as a written word it was part of a political statement concerning the draft, and the kind of language that may be held protected by the First Amendment in that context, with its paramount "redeeming social value," may not be protected in another context where its coarsely offensive nature is unrelieved.

In upholding the search on the basis of a valid arrest for disorderly conduct, we have fully in mind that such an arrest is dependent on a showing by the Government of probable cause to make the arrest. See Wrightson v. United States, 95 U.S. App. 390, 222 F.2d 556 (1955). Nor do we shrug off appellant's contention that his shouted response is today a bland and obsolete expletive, debased by overuse to non-meaning, and without the potential of being coarsely offensive. But the requirement on the Government to support the validity of the arrest is rooted in practical common sense and reasonableness, as was aptly noted by Judge Wright, for the court, in Bailey v. United States, 128 U.S. App. D.C. 354, 357-58, 389 F.2d 305, 308-09 (1967) (omitting citations):

> Probable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case. It has been said that " '[t]he substance of all the definitions' of probable cause 'is a reasonable ground for a belief of guilt.' " Much less evidence than is required to establish guilt is necessary. The standard is that of "a reasonable, cautious and prudent peace officer" and must be judged in the light of his experience and training. The police must have enough information "to warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has committed it. A finding of probable cause depends on the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

The essence of the requirement of a showing of probable cause in case of arrest without a warrant is that it requires the police officer involved to go beyond intuitive suspicion,

and bring forward "a substantial objective basis for believing that the person to be arrested has committed a crime."[6] What the officer brought forth in the case at bar was not mere intuition but objective factors that sufficed, we think, to show probable cause to believe that a misdemeanor had been committed in the officer's presence, by a man now running away, hence to show the validity of the arrest.

As to the case at hand, the officer had been on foot patrol on this beat—carney block 108 (from Wisconsin Avenue to 30th Street, and from N to R Streets)—for approximately three months when this incident took place in front of 3146½ O Street, Northwest, at approximately 8:15 p.m. on October 3, 1969. The reason why the officer wanted to talk to appellant was, concededly, only a suspicion—a suspicion of drug traffic. And the officer was aware, he testified, that the appellant was not required to answer him and was free to depart. (Transcript, p. 12). But appellant did not merely depart. He also shouted what the officer referred to as these "profane words," when there were five or six citizens within hearing range (transcript, p. 12), and began to run.

In the DCCA, Judge Gallagher dissented on the ground that the officer "said he did not know whether anyone had even heard the obscenity." With all respect, this is too technical an approach to a problem that all concede must be looked at in terms of reasonableness and practicalities. Of course the policeman did not take time to canvass the passers-by to learn whether they had in fact been offended. The appellant was running away. The officer had to act immediately or not at all. Nor was he required, on apprehending defendant some blocks away, to return to the original scene for an interview with the spectators. The fact that they had in the meanwhile gone about their business would not undercut the arrest. The officer's own experience

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[6] AMERICAN LAW INSTITUTE MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES (Tent. Draft No. 2, 1969) § 3.01.

—which included service in this area—led him to consider these words as "profanities." He was required to bring forward the reason for his arrest, but once he had done this, the arrest is not to be upset as unlawful unless there is a judicial determination that it was without probable cause.

We reiterate that we are not deciding that defendant was guilty of disorderly conduct, a decision that would require a determination concerning community standards. The standard that governs arrest does not require proof enough to convict. The police officer's probable cause for arrest may stand even though the prosecutor needs additional evidence for the preliminary hearing or the trial.

We are aware that conventions and fashions in language change. But we do not think that it can be doubted that these words have at least some minimal shock quality—we would recognize that well enough if they were shouted in a courtroom, or even a court corridor—that is sufficient to allow a criminal proceeding to be begun. And that is what is involved in the validity of an arrest. Indeed, there is implicit recognition of such shock value in another of appellant's arguments—that cursing is a useful safety-valve for pent-up hostility; that there is a cathartic charge in using words with a shock value, which justifies the use of such language in the service of a broader public interest. Whatever therapeutic claims may be made for this safety-valve in the context of language spoken solely to a policeman, or in private, we do not see it as establishing a license to shout shocking and offensive expressions on the public streets, without regard to public annoyance.

Anything is possible; it is possible that this policeman was an old-fashioned fuddy-duddy who was not aware that the shockers of yester-year are today's common idiom on the residential streets of Georgetown. But as *Bailey* and many other cases[7] reiterate—over and over again—the

[7] *E.g.*, Draper v. United States, 358 U.S. 307 (1959); Lewis

question is, not what would be held at a trial on the merits, but what it was reasonable for the policeman to do in the circumstances. We must give some credit to the policeman for ability to assess the ordinary impact of the sights and sounds he hears, at least for the purposes of an initial determination on his part to make an arrest, and subject to whatever might be brought out on cross-examination or rebuttal at a preliminary hearing or trial. We are not prepared to lay down a rule that there is such a constitutional privilege to shout four-letter words on a public street that a policeman who explains that he had made an arrest for the shouting of such language within hearing of citizens on the street must be held to have failed to show probable cause. We think the record before us does not permit us to vitiate the arrest for disorderly conduct.[8]

Affirmed.

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v. United States, 135 U.S. App. D.C. 187, 417 F.2d 755 (1969); Davis v. United States, 133 U.S. App. 172, 409 F.2d 458 (1969); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945).

[8] We are certainly not precluded from sustaining an arrest on the ground set forth by the arresting officer, merely because the prosecutor—for reasons of his own, perhaps tactical—sought to uphold the search on a broader ground, that would not depend on the existence of a valid arrest.

We need not inquire as to the procedural problem that may be involved when an arrest made for one violation is defended on the basis of another. Here, the arrest was for disorderly conduct, and we hold that there was probable cause for disorderly conduct violation.

Neither Judge Gallagher dissenting in the DCCA, nor appellant before us—who was spirited both in brief and oral argument in challenging the position taken by Judge Kern's opinion—made any claim that Judge Kern's opinion was objectionable as sustaining the validity of the arrest on a ground as to which appellant had counter-evidence that he had not fairly been given the opportunity to present.

WRIGHT, *Circuit Judge, dissenting*: I share the majority's reluctance to affirm this conviction on the basis of the views expressed by Judge Nebeker. *See* majority opinion at 2-3 n.1. I had not thought that anything in *Terry* v. *Ohio*, 392 U.S. 1 (1968), changed the long-standing rule that evidence resulting from a search incident to an unlawful arrest is inadmissible. Nor had I doubted that when a policeman on the beat announces, "You are under arrest," he means what he says, and his words are sufficient to effect an arrest.[1] It follows that, if the arrest is invalid, the incident search is invalid as well, even if it is confined to the sort of superficial frisk which would have been permissible following a *Terry* stop. *See Clarke* v. *United States*, D.C.C.A., 256 A.2d 782, 786 n.7 (1969). Any less stringent rule would mean that whenever the police had the reasonable suspicion necessary for a *Terry* stop, they could instead arrest the suspect and subject him to all the indignities which an arrest implies without losing the benefit of the evidence seized so long as that evidence might have been uncovered by a superficial frisk. As this court said in *United States* v. *Cunningham*, 138 U.S.App.D.C. 29, 30, 424 F.2d 942, 943, *cert. denied*, 399 U.S. 914 (1970): "A lack of probable cause cannot be made up in hindsight by a hypothetical variation in the basis on which a search was conducted." *Cf. United States* v. *Morris*, 142 U.S.App.D.C. 196, 197, 440 F.2d 224, 225 (1970).

I do not agree, however, that this conviction may be rehabilitated on the *post hoc* theory that probable cause existed for a disorderly conduct arrest.[2] Nor do I approve the

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[1] I am thus in full agreement with Judge Gallagher's observations: "A person can hardly be more under arrest than when an officer plainly tells him he is. In criminal law these are critical words and not mere conversation." *Von Steichter* v. *United States*, D.C.C.A., 267 A.2d 336, 342 (1970) (dissenting statement).

[2] It is worth noting that the Government did not even advance this argument before the trial judge or the District

majority's cavalier treatment of appellant's argument that the words he spoke were not in that context so offensive as to justify an arrest under the principles explained in *Gooding* v. *Wilson*, —— U.S. ——, 40 U.S. L. WEEK 4329 (March 23, 1972), *Cohen* v. *California*, 403 U.S. 15 (1971), and *Williams* v. *District of Columbia*, 136 U.S.App.D.C. 56, 419 F.2d 638 (1969) *(en banc)*. Although the majority concedes that "conventions and fashions in language change," it nonetheless proceeds to hold that appellant's words still retain "shock quality." In so doing, my brothers resolve a question of fact about which this court has no expertise and on which no record was made below.

In my view, it is not the function of judges to decide on the basis of their own sensibilities which words retain "shock quality" and which "are today's common idiom." No case that I know of authorizes use of the judicial process to figuratively wash out the mouths of criminal defendants who use language which some judge, on his own, considers "dirty" or "offensive."[2] Writing only a few months ago in *Huffman* v. *United States*, —— U.S.App.D.C. ——, ——, —— F.2d ——, —— (slip opinion at 16) (No. 23,781, decided October 7, 1971), Judge Leventhal warned: "Judges concerned with the many elements comprised in our free, democratic society must take care lest they decide these

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of Columbia Court of Appeals. The argument makes its first appearance in Judge Kern's opinion, in which neither Judge Gallagher nor Judge Nebeker concurred.

[2] Nor do I know of any case which authorizes a judge to assess the offensive potential of words spoken on the street on the basis of what he would do "if they were shouted in a courtroom, or * * * court corridor." Majority op. at 8. On the contrary, I had thought that the Constitution permitted sanctions on speech in and around courts which would not be permissible if applied to the streets. *See Cohen* v. *California*, 403 U.S. 15, 19 (1971); *Cox* v. *Louisiana*, 379 U.S. 559, 562-564 (1965).

cases on the basis simply of their indignation and disgust • • •." Because I for one take that warning seriously, I think this case should be remanded for a factual determination as to whether the arresting officer had probable cause to believe that appellant's words were so offensive where spoken as to threaten a breach of the peace.

After *Williams* v. *District of Columbia, supra,* it should be clear that a conviction under 22 D. C. CODE § 1107 (1967) is permissible only in very special circumstances. It is not enough that "obscene" or "profane" language be spoken in a public place. In addition "the language [must] be spoken in circumstances which threaten a breach of the peace. And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." 136 U.S.App.D.C. at 64, 419 F.2d 646. (Footnotes omitted.) Any broader reading of the statute would interfere with the "unwritten amenities [which] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity" and which "have encouraged lives of high spirits rather than hushed, suffocating silence." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 164 (1972).

I do not understand the majority to argue that Von Sleichter's arrest was permissible under the first branch of the *Williams* test—that is, because probable cause existed to believe that Von Sleichter's words created a risk of imminent violence. Nor would such an argument be tenable. Von Sleichter directed his epithet at the arresting officer, and it is clear that the risk of provoking a policeman to violence cannot justify an arrest since the police, as representatives of the law, are held to a higher standard than ordinary citizens. *See Landry* v. *Daley,* N.D. Ill., 288 F.Supp.

183, 187, 192-193 (1968). *Cf. Williams* v. *District of Columbia, supra,* 136 U.S.App.D.C. at 64 n.23, 419 F.2d at 646 n.23. True, there is some evidence in the record that some other passers-by heard Von Sleichter's epithet, although even this fact is not unambiguously established.[4] But there is no evidence at all that these bystanders were about to resort to violence in order to retaliate for a verbal assault not even directed at them. Hence the situation is essentially the same as that described in *Cohen* v. *California, supra:*

> "• • • While the four-letter word • • • is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' • • • Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. • • • There is • • • no showing that anyone • • • was in fact violently aroused or that appellant intended such a result."

403 U.S. at 20. If appellant's arrest is to be justified at all, then, it must be supported on the basis of the second branch of the *Williams* test—that is, because his words are, "under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear [them] as to amount to a nuisance." *Williams* v. *District of Columbia, supra,* 136 U.S.App.D.C. at 64, 419 F.2d at 646. It seems to me, however, that grave constitutional questions can be

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[4] The arresting officer testified as follows during the probable cause hearing:

> "A. • • • I asked if I could speak with him and he shouted the profanities and began to run.
>
> "Q. You didn't ask any of these people if they heard this; did you?
>
> "A. No, I didn't.
>
> "Q. You don't know if they did or not; is that correct?
>
> "A. That's correct."

Transcript at 13.

raised as to the continuing validity of the second branch of *Williams* after the Supreme Court's decisions in *Cohen* and *Gooding*. In *Cohen* the Supreme Court held that "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." 403 U.S. at 21. True, *Cohen* involved an expletive which was written rather than shouted and which was, in some sense, political. But the same cannot be said for the speech in *Gooding*, which was shouted at a policeman in a manner strikingly similar to that employed in this case. *See* —— U.S. at ——, 40 U.S. L. WEEK at 4329-4330 n.1. The Supreme Court nonetheless found the statute under which the defendant was prosecuted facially invalid because its scope was not limited to "fighting words" likely to provoke immediate violence. *Cf. Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). In so doing the Court explicitly rejected the state's arguement that it had an interest in preventing speech which was merely "offensive" even if it was unlikely to lead to immediate violence. A statute which "makes it a 'breach of peace' merely to speak words offensive to some who hear them • • • sweeps too broadly." —— U.S. at ——, 40 U.S. L. WEEK at 4332. I fail to understand how this holding can be reconciled with the second branch of *Williams*, which makes punishable words "offensive to members of the public who actually overhear [them]."

Moreover, even if the second branch of the *Williams* test is still good law, there remains an insurmountable barrier to its use here. *Williams* requires a measurement of the language used against "contemporary community standards." But in order to perform such a measurement, the content of those standards must first be determined. Unfortunately, the record is altogether barren on this subject. There is no indication whatever that anyone who "actually overhear[d]" Von Sleichter's verbal assault was thereby offended, or that his words in any way departed from the

standards of the community in which the incident occurred. The majority seeks to fill the lacuna by taking judicial notice of the fact that Von Sleichter's words "have at least some minimal shock quality." Majority opinion at 8. With all respect, it seems to me this formulation represents a considerable watering down of the *Williams* test. It is one thing to find that this expletive has "at least some minimal shock quality," and quite another to find that it is, "under 'contemporary community standards,' so grossly offensive • • • as to amount to a nuisance."

When the correct test is applied, I think one can seriously question on a factual level whether these words still fit within it. Thus, although upper New England is hardly known for its lax community standards, Chief Judge Aldrich, writing for the First Circuit Court of Appeals about the same language used in this case, has stated, "[W]e cannot think that it is unknown to many students in the last year of high school," and noted that the words are used "by young radicals and protesters from coast to coast." Judge Aldrich went on to observe, "If • • • students must be protected from such exposure, we would fear for their future." *Keefe* v. *Geanakos*, 1 Cir., 418 F.2d 359, 361 (1969).

But it is not my intention to engage in arid debate about whether certain language is or is not consonant with modern community standards since there is, I think, a more important point to be made. In my view, this court commits a serious impropriety when it draws a conclusion about community standards without the benefit of any evidence in the record and without permitting argument on the point before the trial judge.[5]

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[5] The majority contends that appellant implicitly concedes that he violated community standards by arguing that cursing is a useful safety valve. Majority op. at 8. No doubt this "concession" will come as a considerable surprise to appellant. Since judicial notice seems to be in vogue, I think we can

I have never been one who believed that judges should check in their common sense when they assume the bench or that studied myopia is a good substitute for judgment and wisdom. But neither do I think the case for judicial activism need rest on the obviously false premise that judges are omnipotent and omniscient. I share Professor Jaffe's view that "constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589 (1965). But that is not to say that judges can be everywhere and see everything. In fact, most judges by necessity lead somewhat insulated lives, and this very detachment which gives them the perspective to decide broad issues of policy makes them poor judges of community standards on the street.

Moreover, even if one assumes—erroneously, in my view—that judges are qualified to determine community standards in general, it still does not follow that they have the specialized knowledge which *Williams* requires. Under *Williams,* Von Sleichter can be punished only if his language was "so grossly offensive to members of the public *who actually overhear* it as to amount to a nuisance." 136 U.S. App.D.C. at 64, 419 F.2d at 646. (Emphasis added.) Hence the relevant community under the *Williams* test is not the nation as a whole or even the city of Washington. It is, rather, the immediate neighborhood in which the words were spoken. Surely we cannot assume that judges can speak authoritatively as to the community standards of a portion of the city about which they may know nothing and which they may never have even entered. When faced with the impossible task of articulating such standards on their own, it is almost inevitable that judges will slip over into

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notice the fact that people do all sorts of things to relieve pent up hostility which by no stretch of the imagination violate community standards.

the sort of individualistic, subjective judgments which the *Williams* test was designed to avoid.

It is fears such as these which have led some of our most respected judges to eschew the task of giving content on their own to community standards—a task which the majority casually assumes today. Thus Judge Thornberry, writing for a panel of the Fifth Circuit, recently held that judges "cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we as a Court, or as individuals left to our own devices and without the aid of evidence, could determine the correct standard." *United States* v. *Groner*, 5 Cir., —— F.2d ——, —— (slip opinion at 14) (No. 71-1091, decided January 11, 1972). Similarly, in a scholarly and careful opinion by Mr. Justice Tobriner, the California Supreme Court has held that an obscenity conviction cannot stand unless expert evidence is introduced at trial as to contemporary community standards.

> "Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as to the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards. We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards. An even-handed application of the criminal law, even with evidentiary guidance * * *, is sufficiently difficult in an area so confusing and intricate as obscenity. To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene

> such conduct or material as is personally distasteful or offensive to the particular juror. • • •"

In re Giannini, 72 Cal.Rptr. 655, ——, 446 P.2d 535, 543 (1968). (Footnote omitted.) And of course I have already quoted Judge Leventhal's eloquent warning against individualistic, judicially imposed community standards. *See* text at pages 11-12 *supra*. The majority does not begin to explain why this court's past refusal to "rest on our own untutored view" of the character of the activity involved, *Huffman* v. *United States*, *supra*, —— U.S.App.D.C. at ——, —— F.2d at —— (slip opinion at 28), should not extend to this case. *See also United States* v. *Klaw*, 2 Cir., 350 F.2d 155, 170 (1965); Comment, *Expert Testimony in Obscenity Cases*, 18 HASTINGS L. J. 161 (1966).

To be sure, there are some jurisdictions where juries, at least in some cases, are allowed to evaluate putatively obscene material without expert guidance and measure it against their own notions of what the community standard is. *See, e.g., United States* v. *Wild*, 2 Cir., 422 F.2d 34 (1969), *cert. denied*, 402 U.S. 986 (1971); *Kahm* v. *United States*, 5 Cir., 300 F.2d 78, *cert. denied*, 369 U.S. 859 (1962). But these cases are premised on the notion that juries themselves function as the embodiment of the community and therefore require no experts to tell them what the community thinks. Appellate judges are not, of course, the embodiment of the community. Indeed, their decisions derive legitimacy from the fact that the judiciary is insulated from transient community passions and prejudices. "Since an appellate court certainly does not in any sense compose a cross-section of the community, it cannot effectively carry out [its review] function in the absence of evidence in the record directed toward proof of the community standard." *In re Giannini*, *supra*, 446 P.2d at 544. (Footnote omitted.)

Moreover, even in those jurisdictions permitting convictions without expert evidence as to community standards,

the defendant is at least *allowed* to introduce such evidence as part of his rebuttal case. As Mr. Justice Frankfurter made clear years ago:

> "• • • Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, • • • it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. • • •"

Smith v. *California*, 361 U.S. 147, 165 (1959) (concurring opinion).

Yet in this case Von Sleichter was effectively deprived of the opportunity to prove that his conduct was in conformance with community standards—a deprivation which, according to Mr. Justice Frankfurter, "goes to the very essence of the defense and therefore to the constitutional safeguards of due process." *Id.* at 165. True, Von Sleichter never made an actual offer of proof as to community standards before the trial judge, and none of his evidence was excluded. But a close reading of the hearing record makes plain that the prosecutor did not argue that there was probable cause to arrest Von Sleichter for disorderly conduct. Rather, his argument—and presumably the decision of the trial judge as well—was premised on the existence of probable cause to make a narcotics arrest.[6] Surely we

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[6] Thus the prosecutor made the following statement in summation:

> "We don't rely solely on the flight. We rely on three factors—the area; the transaction, the seemingly [*sic*] transaction the officer saw; and, the flight. Which, in the Government's position, brings the case over the ledge to attain probable cause. It may be a fine question. That's

expect too much if we require the defendant to anticipate and rebut an argument which the Government failed to make either at the hearing or in its appellate brief and which made its first, unheralded appearance in an opinion by one of the reviewing judges of the District of Columbia Court of Appeals. Placing this burden on the defendant would require him to introduce evidence of a lack of probable cause for arrest for every crime listed in the statute books. Thus, even if I agreed with the majority that judges are qualified to discern the community standard on their own, I would still hold that this case should be remanded to allow appellant to introduce evidence on this vital question.

One final point needs to be made. The majority suggests that the principles governing this case are somehow different because the question before us is not whether Von Sleichter actually committed the crime of disorderly conduct, but rather whether the police officer had probable cause to believe that the crime had been committed. But while it is true that the Government's burden of proof is substantially lower in a probable cause hearing than it would be in a criminal prosecution, *see, e.g., Brinegar* v. *United States,* 338 U.S. 160, 175 (1949), this difference has never been thought sufficient to transmogrify a question of fact about which evidence is required into a question of law which the judge can decide without evidence. We have held that "[p]robable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case," and that "[m]uch less evidence than is required to establish guilt is necessary." *Bailey* v. *United States,* 128 U.S.App.D.C. 354, 357-358, 389 F.2d 305, 308-309 (1967). But we have also made clear that the burden is on

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the Government's position. We'll leave it to the court to decide."

Tr. at 19.

the Government to establish probable cause and that it cannot meet this burden by putting on testimony as to the bare facts surrounding the arrest and depending upon the trial judge to fill in the gaps. I agree with the majority that "[w]e must give some credit to the policeman for ability to assess the ordinary impact of the sights and sounds he hears." But there is no indication in this record that the arresting officer made such an assessment. The officer did not testify that he was aware of community standards in the area, that in his judgment appellant had violated those standards, or that he thought a breach of the peace was imminent. Rather, the officer's testimony consisted entirely of a skeletal account of Von Sleichter's conduct prior to the arrest. Our comments in *Wrightson* v. *United States,* 95 U.S.App.D.C. 390, 392, 222 F.2d 556, 558 (1955), where the Government testimony was similarly elliptical, seem particularly apt:

> "The point here is that at the trial, when the search and the arrest were under attack as illegal, the officer and the prosecutor chose not to reveal what cause there was for the arrest and thus not to support its legality. There is law which governs arrest, that law is binding upon police officers, and persons arrested have a right to invoke it."

This court has recently gone to great lengths to show that arrests are not somehow insulated from the constitutional protections which surround the rest of the criminal process. *See Hall* v. *United States,* —— U.S.App.D.C. ——, —— F.2d —— (No. 20,711, decided December 17, 1971) (*en banc*). I am surprised and disappointed to see this salutary principle apparently abandoned so soon after its exposition.

By citing *Hall,* however, I do not mean to suggest that the law upon which I rely is in any way new. In fact, it has been clear for at least 50 years that, when the Fourth Amendment is raised to challenge the admissibility of evidence, the trial judge must hold a hearing to evaluate the competing factual assertions of the parties with respect

to how the evidence was obtained. *See Gouled* v. *United States*, 255 U.S. 298 (1921); *Nardone* v. *United States*, 308 U.S. 338 (1939). Of course, such a hearing would be a meaningless formality if the trial judge were permitted to assume, without the benefit of evidence, that probable cause existed for a challenged search or arrest. *See, e.g., United States* v. *Jeffers*, 342 U.S. 48, 51 (1951); *United States* v. *Johnson*, 9 Cir., 425 F.2d 630, 632 (1970), *cert. dismissed*, 404 U.S. 802 (1971); *Williams* v. *United States*, 5 Cir., 382 F.2d 48, 50 (1967). Hence it is hardly surprising that the Supreme Court has stood ready to reverse a conviction when insufficient evidence appeared on the record to show that the search or seizure comported with the commands of the Fourth Amendment. *See, e.g., Recznik* v. *City of Lorain*, 393 U.S. 166, 168 (1968). Moreover, these procedural requirements are particularly vital where, as here, First Amendment rights are at stake—rights which can be stifled as effectively by a wrongful arrest or seizure as by a wrongful conviction. *See* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 538 (1970). *Cf. Marcus* v. *Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964).

I am at a loss to understand why these long-standing principles should be ignored in this case. To be sure, usually the Fourth Amendment problem arises in the context of a challenge to the identity of the defendant, whereas here the issue is whether a crime was committed at all. But surely this is not a difference in principle. Probable cause requires not only a reasonable determination by the arresting officer that the suspect is probably guilty, but also a reasonable determination by the officer that criminal conduct has occurred. In this case, criminal conduct can only have occurred if community standards were violated. And we cannot know whether these standards have been violated until we have some evidence as to what the standards are.

It is possible, I suppose, to imagine some hypothetical case where a fact is not sufficiently obvious for judicial notice in a criminal trial but can be noticed under the lower standard of proof applicable in a probable cause hearing. But the theoretical existence of such a possibility should not trouble us in this case. Where, as here, there is no evidence of imminent violence, no evidence that anyone was offended by the defendant's words, and only inconclusive evidence as to whether the words were overheard at all, I would require at least some testimony as to community standards before sanctioning a disorderly conduct arrest. As Mr. Justice Harlan has reminded us in an only slightly different context, "Any broader view • • • would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California*, *supra*, 403 U.S. at 21. And lest we underestimate the stakes in criminal prosecutions such as this one, Mr. Justice Harlan offers another admonition:

> "To many, the immediate consequence of [First Amendment] freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense[,] not a sign of weakness, but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. • • •"

Id. at 24-25.

In my view, the majority has failed to take sufficient cognizance of the "fundamental societal values" implicated in this case. I must, therefore, respectfully dissent.

APPENDIX B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,456

WILLIAM VON SLEICHTER, APPELLANT

v.

UNITED STATES OF AMERICA

Supplemental Opinion

Filed August 4, 1972

Judgment entered this date

Before WRIGHT, LEVENTHAL, and MACKINNON, *Circuit Judges.*

Opinion for the Court filed by LEVENTHAL, *Circuit Judge.*

Dissenting opinion filed by WRIGHT, *Circuit Judge*, at p. 3.

LEVENTHAL, *Circuit Judge*: Appellant's petition for rehearing and the memorandum of amicus lodged with the court, focus on Gooding v. Wilson, 405 U.S. 518 (1972) and

Cohen v. California, 403 U.S. 15 (1971). We have considered these opinions again, especially in view of the orders entered by the Supreme Court on June 26, 1972, in Rosenfeld v. New Jersey, Lewis v. City of New Orleans, and Brown v. Oklahoma, 40 U.S.L.W. 3612 (1972), vacating convictions for disorderly conduct and remanding for consideration in the light of *Gooding* and *Cohen*.

None of these cases involve constitutional immunity for the particular conduct, but the very distinct question of the overbreadth of the underlying statute. Convictions under such statutes must be reversed even though a narrower statute could concededly be applied to prohibit the conduct involved. The issue of statutory overbreadth is not a problem in the District of Columbia, because our disorderly conduct laws, 22 D.C. Code §§ 1107, 1121, have been subjected to a narrowing construction by this court in Williams v. District of Columbia, 136 U.S.App.D.C. 56, 419 F.2d 638 (en banc, 1969).

Apart from the "fighting words" context, *Williams* sets forth that the statute is not applicable for mere use "of indecent or obscene words" but only if the language "is, under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." We think this is valid under *Gooding* and *Cohen*.*

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* In Rosenfeld v. New Jersey, the Supreme Court remanded for reconsideration under a statute, prohibiting public uttering of profane or indecent language, that was construed to apply whenever words were "likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of the hearer." State v. Profaci, 56 N.J. 346, 353, 266 A.2d 579, 583-84 (1970). Without attempting to predict the outcome of Rosenfeld, we see a distinction between language that merely affects the sensibilities of others, and language so grossly offensive under contemporary community standards as to amount to a nuisance.

Appellant believes that we mis-read Williams, and that it disallows any statutory prohibition on "talking back" to a policeman. Our opinion does not sanction an arrest for disorderly conduct for talking back to a policeman, but rather upholds the policeman in finding probable cause to believe appellant subjected bystanders to a nuisance. There is not a glimmer or scintilla in this record of any indication of bad faith, harassment or police misconduct. Whether the policeman had probable cause to believe that a misdemeanor had been committed in his presence is erroneously confused by appellant with the quite distinct question of whether there was proof of such a violation beyond a reasonable doubt.

We were not required in this case to consider whether or under what circumstances a valid arrest of a person not in flight may turn on the policeman's ascertaining the impact of the words on the hearers or overhearers as part of his assessment of defendant's conduct. In this case appellant was in flight, was validly detained from further flight, and was thus properly searched for weapons. The conduct of the arresting officer was reasonable under the circumstances, and the subsequent discovery of the heroin was not unlawful.

Petition for rehearing denied.

WRIGHT, *Circuit Judge, dissenting*: For obvious reasons, the majority feels the need to distinguish the *Rosenfeld, Lewis* and *Brown* cases decided by the Supreme Court after our panel opinions came down. I submit the distinctions sought to be made are without substance.

The majority asserts that "[t]he issue of statutory overbreadth is not a problem in the District of Columbia" because 22 D. C. CODE §§ 1107 and 1121 "have been subjected to a narrowing construction by this court in Williams v. Dis-

trict of Columbia * * *." Yet in *Rosenfeld* v. *New Jersey* the Supreme Court summarily vacated a New Jersey disorderly conduct conviction over Mr. Justice Powell's dissenting opinion wherein he correctly pointed out that the New Jersey Supreme Court's construction of its statute was almost identical to the construction of our statute adopted in *Williams*.

The majority also says our task is made easier by the fact that we can uphold the arrest in this case without reaching the question whether the underlying statute could constitutionally support a conviction. Perhaps I am overly simplistic about these matters, but I had thought that the First Amendment protected citizens from harassing arrests as well as convictions. Indeed, the Supreme Court has even held that when arrests are made by state officers for conduct which cannot possibly serve as a constitutional predicate for conviction, the federal courts have a special obligation to intervene. *See Younger* v. *Harris*, 401 U.S. 37 (1971); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1961). In my view, we should fulfill that obligation on this appeal.

APPENDIX C

FILED JUN 30 1970

Alexander L. Stevas
Clerk

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5183

WILLIAM VON SLEICHTER, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the District of Columbia
Court of General Sessions

(Argued January 20, 1970 Decided June 30, 1970)

Sol Rosen, appointed by the court, for appellant.

John O'B. Clarke, Jr., Assistant United States Attorney, with whom *Thomas A. Flannery*, United States Attorney, *John A. Terry*, and *John G. Gill, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before KERN, GALLAGHER and NEBEKER, Associate Judges.

JUDGMENT

This cause came on for hearing on the record on appeal and the briefs of the parties and was argued by counsel. On consideration thereof, it is by the court this 30th day of June, 1970,

ORDERED and ADJUDGED that the judgment of conviction be and hereby is *affirmed*.

BY THE COURT:

Statement of Associate Judge NEBEKER, who votes to affirm: This is an appeal from a judgment of conviction of possession of heroin in violation of D.C. Code 1967,

§ 33-402.[4] Appellant personally waived trial by jury and is taken to have agreed to the stipulation made just prior to the waiver that the issue of guilt depended entirely on the legality of the seizure of the heroin. For his possession of this most insidious of all dangerous drugs a fine of "$100 or 90 days" in jail was levied.

Officer Dinger, who had been assigned to the particular area in the Georgetown section of this city for about three months, was on foot patrol shortly after 8 p.m. on October 3, 1969. He described the area as being "high in narcotics traffic." From across a street, the officer saw appellant and two other male persons, whom he did not recognize, "standing in a darkened area." He concluded from what he saw "that there was a narcotic transaction made—because of the way the hands were changing in the group. . . . [T]he defendant and the other two male subjects [were] standing there close together. They were talking and their hands were going in between them. They were in a close group." The officer, being suspicious,[1] approached the group to investigate and as he did so, appellant, who observed him coming, "began to walk away rapidly." When the officer asked to speak to appellant for a minute he uttered a vile directive and ran. In giving chase, the officer rounded a corner and was told by a couple who were walking by that appellant had crossed the street and was hiding behind a Volkswagen parked at the curb. Officer Dinger walked to the other side of the car and found appellant lying on the ground next to the curb "attempting to crawl under the car." Appellant was prone with his hands under his stomach. The officer told appellant he was under arrest for disorderly conduct. Appellant refused two requests to bring his hands out, but on the third request, with an added statement that he would be assisted, appellant moved his hands into view and got to his feet.

[1] He had observed a similar situation two nights before and it turned out to be a narcotics transaction.

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As he did so the officer saw "a plastic bag containing five pieces of tin foil" in the area where appellant had been lying. The officer seized the bag and it later proved to contain the contraband.

At the motion to suppress the parties dealt only with the issue of probable cause. Appellant also asserted that it was illegal to arrest him for disorderly conduct. He relied upon *Williams v. District of Columbia,* —— U.S.App.D.C. ——, 419 F.2d 638 (1969), for the contention that the vile directive could not constitute the offense of disorderly conduct. The trial judge denied the motion without making specific findings.

As I see this case we need not and should not reach these points because it can be otherwise concluded that the seizure did not result from unreasonable invasion of appellant's fourth amendment right to be secure from unreasonable seizure. *Cf. United States v. Van Leeuwen,* —— U.S. ——, 90 S.Ct. 1029 (1970). *Compare Sibron v. New York,* 392 U.S. 40 (1968), and *United States v. Curtis,* —— U.S.App.D.C. ——, —— F.2d —— (No. 22,470, decided *en banc* May 19, 1970). And see *Young [illegible] v. United States,* —— U.S.App.D.C. ——, —— F.2d —— (Nos. 21,756, 21,757, 21,857, decided June 26, 1970).

Since the inception of the exclusionary rule, the question has always been—did the officers of the state have probable cause to encroach upon the liberty of the citizen? Phrased differently—was the action of the police reasonable under the circumstances? *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Weeks v. United States,* 232 U.S. 383 (1914). The necessity always to decide this issue has earlier been taken for granted except where the defendant abandoned the evidence[2] or otherwise lacked standing to challenge its admissibility.[3]

[2] *See, e.g.,* Hester v. United States, 265 U.S. 57 (1924).

[3] *See, e.g.,* Parman v. United States, 130 U.S.App.D.C. 188, 399 F.2d 559 (1968).

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With the decision of the Supreme Court of the United States in *Terry v. Ohio, supra,* a new approach appears permissible and desirable where police justifiably pursue an investigative course necessitating limited encroachment on personal freedom and security. This is not to say that if police conduct progresses to a point where significant and substantial trappings of formal arrest are present, including but not limited to an in-depth or body search, that a lack of probable cause can be plastered over and ignored. Such a case was recently decided by the United States Court of Appeals for the District of Columbia Circuit where the arrest was made with guns drawn and an immediate thorough search was undertaken. *See United States v. Cunningham,* —— U.S.App.D.C. ——,—— F.2d —— (Nos. 22,073-74, decided April 1, 1970). In the instant case, as discussed *infra,* the events prior to the seizure of the heroin lacked significant and substantial indicia of formal arrest.

In its opinion in *Terry,* the Supreme Court clearly indicates that an officer's action can be held valid "regardless of whether he has probable cause to arrest the individual for a crime." *Id.* at 27. *See also Keiningham v. United States,* 113 U.S.App.D.C. 295, 307 F.2d 632 (1962). Such approach permits a testing of certain limited police action resulting in seizure of evidence on a *Terry* standard without the necessity of first reaching the question of probable cause. *Cf. Young* [redacted] *v. United States, supra,* slip opinion at 5.

The desirability of looking initially to whether some police action was justified without necessarily first deciding whether probable cause existed is apparent when it is recognized that police should be encouraged to commendable behavior and discouraged from condemnable behavior. When, in his view, an officer deems it his duty to investigate ongoing activity, he should not be prompted to refrain from action because he, rightly or wrongly, may

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believe he lacks probable cause. Likewise, where his instinct to investigate is activated, he should not be placed in the intolerable position of knowing that further investigation may result in an "arrest" without probable cause. *See Coleman v. United States,* ——U.S.App.D.C. ——, 420 F.2d 616 (1969) (Bazelon, C.J., concurring, Part II). I believe such a method of reviewing police action in cases where *Terry* rationale applies is appropriate and advisable. The question as I see it here then is whether the circumstances and the conduct of the police permit an application of *Terry* principles to justify the seizure. *Terry,* of course, deals with a rapidly moving on-street investigation where the police must, to be effective, act in quick progression. This case is like *Terry* in that sense and, thus, I would hold that it is appropriately decided under that precedent. In making this decision it must be kept in mind that the Supreme Court was careful to limit the scope of circumstances and the nature of police conduct which would be justified short of arrest. Moreover, the Court emphatically rejected the proposition that a "seizure" of the person under circumstances not resulting in the "traditional" or formal arrest[4] was beyond the proscription of the fourth amendment. Accordingly, a determination to apply the *Terry* rationale must be made with circumspection and in the Fourth Amendment context of reasonableness. In an analysis of the facts, it must be kept in mind that the police need "an escalating set of flexible responses, graduated in relation to the amount of information they possess." 392 U.S. at 10.

"The crux of this case . . . is not the propriety of Officer [Dinger's] taking steps to investigate [appellant's] suspicious behavior, but rather, whether there was justification for [Dinger's] invasion of [appellant's] personal security by [requiring him to move his hands into view

[4] Entailing "a trip to the station house and prosecution for crime". Terry v. Ohio, 392 U.S. 1, 16 (1968).

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and get off the ground]." *Terry v. Ohio, supra* at 23. In the course of investigating what might have been a narcotic transaction, the officer was met with vile words, flight and a bizarre attempt to hide under a small car. When the officer, naturally continuing his investigation, located appellant, it was reasonable, both for security and the sake of the investigation,[5] to seize appellant by demanding that he put his hands into view and get up. It is, after all, too much to expect the officer to continue with appellant lying in the gutter concealing his hands. *Terry, supra* at 23-24.

Since the actions of the police officer were reasonable to the point of "seizing" appellant by demanding he put his hands in view, it cannot be said that the discarding of the narcotics was the product of illegal police action as in *Williams v. United States,* 99 U.S.App.D.C. 161, 237 F.2d 789 (1956). *See also Wong Sun v. United States,* 371 U.S. 471, 488 (1963). In *Williams,* the defendant, who was illegally arrested, attempted to discard the contraband while in the precinct station. It was held that the abandonment was the product of the illegal arrest and the Government was deprived of that approach to justify the seizure of the evidence. In addition, it cannot be said that *Sibron v. New York,* 392 U.S. 40 (1968), requires a contrary result. In that case, the seizure of the defendant was immediately followed by a "body search" beneath the surface of the clothing. That search was motivated only by a desire to look for narcotics. Here there was no such search which led to the recovery of the seized contraband. Since the seizure of the evidence in this case was not the result of an unreasonable intrusion of appellant's freedom—*i.e.,* a seizure of his person—the denial of the motion to suppress was not error.

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[5] Coleman v. United States, —— U.S.App.D.C. ——, 420 F.2d 616 (1969) (Bazelon, C.J., concurring, Part II), and *Young* [redacted] *v. United States, supra,* slip opinion at 5-6, 7.

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The question remains whether the *Terry* rationale can be applied when the officer, rightly or wrongly, intended to arrest appellant for an offense. Neither the opinion of the Supreme Court in *Terry* nor the opinion of the Ohio Court of Appeals [6] discloses that Officer McFadden thought he was arresting Terry for a specific offense. I adhere to the view that the officer's state of mind, in the circumstances of this case, is not controlling in making a judicial determination whether he otherwise acted reasonably under fourth amendment standards in seizing appellant. No court, to my knowledge, requires that an arresting officer correctly go through the legal reasoning which in his mind justifies his action. While police are held to a high standard, they cannot be expected to engage in an intricate legal analysis when faced with difficult on-street situations. Lawyers and judges, in the relative quiet of the courthouse or library, have difficulty enough arriving at a correct legal theory under which to test the propriety of police action. This case is a good example. *Cf. Jackson v. United States,* 112 U.S.App.D.C. 260, 262, 302 F.2d 194, 196 (1962). The validity of this kind of police action just cannot turn on the hasty legal conclusions of an officer relatively untrained in the law. I find support for this conclusion in *United States v. Bonds,* 422 F.2d 660, 664 (8th Cir. 1970), and *Payne v. United States,* 111 U.S.App.D.C. 94, 96, 294 F.2d 723, 725, *cert. denied,* 368 U.S. 883 (1961). See particularly *Coleman v. United States,* —— U.S.App.D.C. ——, 420 F.2d 616 (1969) (Bazelon, C.J., concurring, Part II), where, notwithstanding intent to arrest manifested by a drawn gun, the author would apply *Terry v. Ohio, supra,* in determining reasonableness. Indeed, it has been held that an expressed intent to refrain from arresting a suspect is not controlling if the suspect would otherwise think he was under arrest. *Seals v. United States,* 117 U.S.App.D.C. 79, 325 F.2d 1006

[6] Ohio v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

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(1963). I do not believe that the Supreme Court, concerned as it was in *Terry* for the necessity to investigate suspicious behavior and the safety of investigating officers, intended to limit its holding to cases where an officer acted knowing or believing he lacked probable cause to arrest, but "seized" the person to investigate anyway. If an officer's error as to the offense for which he believes there is probable cause to arrest is of no consequence *(Payne v. United States, supra)*, or as to when the arrest occurred despite his intentions *(Seals v. United States, supra)*, it should make no difference that the officer in this case intended a formal arrest, when he could have, and perhaps should have, intended only a momentary stop for "seizure" as recognized in *Terry*. Of course, this approach should be limited to situations where, as here, the evidence seized or recovered was not come by primarily as the result of a progression of events which exclusively possess the "concomitants of arrest". *Hicks v. United States*, 127 U.S.App.D.C. 209, 213, 382 F.2d 158, 162 (1967). Here the heroin was on the ground as appellant got to his feet.

Accordingly, I conclude that appellant's personal security was reasonably invaded by the police officer who had no other rational choice than to proceed as he did. I further conclude that it is wrong for the court to be governed in its decision by the label hastily placed by the officer upon his official conduct when an alternative theory clearly is available to uphold that conduct and thus the seizure of the heroin in this case. I, therefore, vote to affirm the conviction.[7]

[7] I do not view our decision in Clarke v. United States, D.C.App., 256 A.2d 782, 788 n.7 (1969), as precluding such an approach in this case. While the Government in that case alternatively urged a *Terry* approach to support the search and seizure of the razor, this court simply concluded that a valid arrest had taken place before the search. Accordingly, we did not need to reach the issue which I see clearly presented here.

. Statement of Associate Judge KERN, who votes to affirm: The arresting officer testified that he heard appellant shout in the presence of several private citizens on a residential street a certain statement considered obscene by the officer.[1] Believing that appellant had thus committed the crime of disorderly conduct, D.C. Code 1967, § 22-1107, the officer placed appellant under arrest. In my view, the officer had probable cause to effect such an arrest, and therefore the later retrieval of the heroin was not tainted. *Cf. Work v. United States*, 100 U.S.App.D.C. 237, 243 F.2d 660 (1957); *Williams v. United States*, 99 U.S. App.D.C. 161, 237 F.2d 789 (1956).

Section 22-1107 makes it unlawful "for any person . . . to curse, swear, or make use of any profane language or indecent or obscene words . . . ." In *Williams v. District of Columbia*, —— U.S.App.D.C. ——, 419 F.2d 638, 646 (1969) (footnotes omitted, emphasis added), the Circuit Court read into this section the requirement

> that the language be spoken in circumstances which threaten a breach of the peace. And for these purposes a breach of the peace is threatened *either* because the language creates a substantial risk of provoking violence, *or because it is under "contemporary community standards," so grossly offensive to members of the public who actually overhear as to amount to a nuisance.*

The court was concerned lest it run afoul of either *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), by holding words not "inherently inflammatory" to be "fighting words," or *Stanley v. Georgia*, 394 U.S. 557 (1969), by holding it unlawful to utter obscene words in private when they were not overheard by anyone.

[1] The facts of the instant case are described in detail by Judge Nebeker in his Statement.

An examination of the court's opinion in *Williams v. District of Columbia, supra*, discloses that the epithets hurled at the arresting officer were perhaps profane, indecent, and uncivil, but hardly of such character as to qualify as an *obscene* nuisance. Since the language did not constitute a nuisance, and further, there being no allegation of imminent violence, the court reversed the judgment of conviction and ordered the information dismissed.

We know from the record in the instant case that appellant's words were spoken in public, within earshot of several citizens.[2] We do not know if they found his language to be "grossly offensive," nor do we know if the Government could have proved beyond reasonable doubt that it violated "contemporary community standards," if appellant had come to trial on the charge of disorderly conduct.[3] However, in my judgment, the answers to these questions are irrelevant to the determination of this case.

> Whether a jury or judge would have convicted him is not the issue; it is whether at the time and place and in the circumstances above set forth [this officer] could reasonably believe—not necessarily beyond a reasonable doubt—that appellant's conduct came within the scope of the [statute].

Worthy v. United States, 133 U.S.App.D.C. 188, 190, 409 F.2d 1105, 1107 (1968). *See, e.g., Brinegar v. United States*,

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[2] The arresting officer testified that five or six persons were on O Street in Georgetown at about 8:15 p.m. "within hearing range" of appellant's obscene shouting. Having heard appellant and seen the location of the others at the scene the officer could reasonably have concluded the probability of their hearing appellant without having to halt his pursuit of appellant who was then in flight and question these "ear-witnesses." In determining the existence of probable cause to arrest, we deal with "reasonable probabilities, not absence of doubt, which reasonable men may entertain." United States v. Cumberland, D.C.App., 262 A.2d 341, 343 (1970).

[3] Language similar to that used by appellant has recently been held to be obscene when used in a printed circular. State v. Ceci, 258 A.2d 788 (Del. Super. 1969).

338 U.S. 160, 172-73 (1949); *Ellison v. United States*, 93 U.S.App.D.C. 1, 3, 206 F.2d 476, 478 (1953). In my opinion, the police officer's conduct in arresting appellant for disorderly conduct was reasonable and based upon probable cause. *Johnson v. United States*, 125 U.S.App.D.C. 243, 244, 370 F.2d 489, 490 (1966).

The police officer's suspicions about appellant's narcotics activity do not affect the legality of the arrest. "When a police officer observes overt criminal conduct and makes an arrest, the fact that the officer suspects other violations not manifest at the time, such as illegal possession of narcotics . . . is totally irrelevant." *Hutcherson v. United States*, 120 U.S.App.D.C. 274, 278, 345 F.2d 964, 968 (Burger, J., concurring), *cert. denied*, 382 U.S. 894 (1965). Because the arrest was lawful, the seizure of the heroin was likewise lawful, and I therefore vote for affirmance.

Statement of Associate Judge GALLAGHER, who votes to reverse: I disagree with the conclusions reached by the other members of this hearing panel and will discuss my reasons separately as to each.

A. It is evident that, at a minimum, Judge Nebeker has grave doubts that there was probable cause for an arrest in this case at the time it was announced by the police officer, else there would be no need to apply *Terry v. Ohio*, 392 U.S. 1 (1968). I understand these doubts. He does not think lack of probable cause at that point is dispositive, however, because he believes the rationale of *Terry* controls. But he concedes that if "police conduct progresses to a point where significant and substantial trappings of formal arrest are present including but not limited to an in-depth or body search" a lack of probable cause cannot "be plastered over" by the *Terry* rationale. Essentially, I agree with this, except to the extent that he seems to define a formal arrest as necessarily including "an in-

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depth or body search." That strikes me as new and rather strong medicine.

If I understand *Terry* correctly it relates entirely to the investigation of "possibly criminal behavior." 392 U.S. at 22. In a nutshell, it permits under reasonable circumstances a temporary detention of a suspect on the street for investigative purposes even though probable cause for arrest is lacking and, where prudent, a search for weapons at the outset of the temporary detention. 392 U.S. at 27. But all this relates to activity short of an arrest.

In this case, the police officer announced to appellant that "he was under arrest for disorderly conduct" before he discovered and seized the narcotics. Consequently, the validity of the seizure must be dependent upon the validity of the arrest. *Terry* does not change this proposition.

Where I depart principally from Judge Nebeker is in his failure to conclude that an actual arrest occurred here prior to that seizure, even though the officer stated specifically to appellant that he was under arrest and testified at the trial that he considered he was then making an arrest. I cannot agree that this was merely a "label hastily placed by the officer upon his official conduct" which we can overlook and, instead, apply *Terry*. A person can hardly be more under arrest than when an officer plainly tells him he is. In criminal law these are critical words and not mere conversation. All that remains is transportation to the precinct for booking. The fourth amendment area is elusive enough without adding another element. In my view, an arrest occurred when it was announced, foreclosing the application of *Terry*. *Clarke v. United States*, D.C. App., 256 A.2d 782, 786 n.7 (1969).

B. I take it there is no dispute among us that at the time it was announced there was no probable cause for an arrest on the narcotics charge for which he was convicted. Judge Kern's view, however, is that the narcotics conviction should be affirmed because there was probable cause here

to arrest for disorderly conduct. Appellant was not charged with disorderly conduct and, interestingly enough, the Government has not even contended in its brief that we should affirm on the ground of probable cause for the disorderly conduct arrest. Furthermore, at the hearing on the motion to suppress the narcotics in the trial court, the Government contended only that there was probable cause for an arrest on the narcotics charge. It did not mention the "disorderly conduct" aspect, let alone urge that there were reasonable grounds to arrest on this basis.[1]

Aside from the Government's apparent reluctance to offer this rationale to support the disorderly conduct arrest, I believe the law is clear that there was no probable cause. Under *Williams v. District of Columbia*,—— U.S. App.D.C. ——, 419 F.2d 638 (1969), decided several months before this arrest and trial, there is no violation of the obscenity section of the disorderly conduct statute (D.C. Code 1967, § 22-1107), unless a breach of the peace is threatened "either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards', so grossly offensive to members of the public who actually hear it as to amount to a nuisance." ——U.S.App.D.C. at ——, 419 F.2d at 646 (footnotes omitted).

Here, as the officer crossed the street and said he wanted to talk to appellant, the latter hurled a two-word obscenity over his shoulder as he withdrew at a fast walk. Clearly, no provocation of violence was present as there was no move

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[1] The Government argued that the officer "[k]nows it is a high narcotics area [3100 block of O Street, N.W.]. He sees what could be, although he doesn't know, a narcotics transfer. He goes to investigate, the defendant yells a profanity and flees. * * * [W]e don't rely solely on the flight. We rely on three factors—the area; the transaction, the seemingly [sic] transaction, the officer saw; and, the flight. Which, in the Government's position, brings the case over the ledge to attain probable cause. It may be a fine question. That's the Government's position. We'll leave it to the Court to decide." Tr. 19.

toward a confrontation, quite the contrary, and no threats were made. Secondly, under the circumstances the two-word obscenity could not have amounted to a "nuisance" under *Williams*. While the police officer believed there were "five or six citizens" in the area he said he did not know whether any had even heard the obscenity. Hence, the threshold consideration for a "nuisance" was clearly lacking.

Under these circumstances and in view of the *Williams* decision, I do not believe the officer reasonably could have believed that the crime of disorderly conduct had been committed in his presence by appellant. Consequently, he lacked probable cause to arrest.

Johnson v. United States, 125 U.S.App.D.C. 243, 370 F.2d 489 (1966), is pointed to as support for the validity of the arrest for disorderly conduct. I think *Johnson* is distinguishable for two reasons. It antedated *Williams*, *supra*, and the issue of what constitutes a violation of the disorderly conduct statute was not squarely presented. *Williams* is now the controlling pronouncement on that question in this circuit, in any event. Furthermore, the facts in *Johnson* were quite different. The record shows the defendant was seen running from a church about midnight. The police officer approached him and stated he wished to talk with him, whereupon the defendant patted his pocket which had "a very noticeable bulge" and said, "Oh, no [obscenity]" and backed away. As more officers arrived at the scene, the defendant ran between them and was later apprehended a distance from the scene. It later developed he had a pistol when he initially evaded the officers. He was arrested and booked for disorderly conduct, but was later charged with carrying a concealed weapon without a license after the pistol was located along the route he ran.

The court of appeals stated that "the obscene language addressed to the officer in *the circumstances of appellant's*

conduct" supported the arrest for disorderly conduct. 125 U.S.App.D.C. at 244, 370 F.2d at 490. (Emphasis added.) I believe the circumstances there were considerably different if only because of the seeming threat by the defendant to use a gun. All things considered, I do not view *Johnson* as controlling here.

In taking this view of the case I do not intend to imply that I believe the police officer should not have pursued his on-the-street investigation of appellant. I simply conclude that he did not have reasonable grounds to arrest when he did; and this turned out to be crucial as it usually does. I most certainly think the courts should give the police all reasonable "elbow room" in the investigative phases of these moving street scenes and have said as much. *Thompkins v. United States,* D.C.App., 251 A.2d 636 (1969); *Clark, supra.*

I conclude that the arrest was invalid and the motion to suppress should have been granted. I would reverse.